Dissenting Views on H.R. 4790, the "Shareholder Protection Act of 2010"

The following represents the views of the Republican Members of the Committee on the following issues, consistent with H.R. 4790, Shareholder Protection Act of 2010.

The Majority's designation of H.R. 4790 as the `Shareholder Protection Act' is a misnomer. The bill, conceived of as a legislative response to the January 21, 2010 Supreme Court decision in Citizens United v. Federal Election Commission, 558 U.S. 50 (2010), is less about protecting shareholders and more about favoring the free speech rights of some groups (labor unions) over others (corporations). Under the legislation, public companies would have to prepare political expenditure plans, present the plan to and seek approval from the board, prepare the proxy, and schedule a shareholder vote well in advance of the end of each fiscal year. H.R. 4790 would deny public corporations the flexibility to engage in the political process, and prejudice their ability to advocate for or against legislative or regulatory initiatives while still allowing unions to freely engage in these activities.

Corporate boards and management have fiduciary duties to the company and to the shareholders, yet H.R. 4790 would hamstring these obligations and weaken corporations. If H.R. 4790 is enacted, public corporations will be forced to predict all political expenditures for an upcoming fiscal year many months in advance to ensure that shareholders approve of the plan before the end of the company's fiscal year. This will severely limit the free speech of all corporations by prohibiting them from reacting to new or unexpected issues that impact their business, ultimately eroding shareholder value.

The Majority confidently asserts that H.R. 4790 would not impose additional costs on public companies because corporations would simply add another line to their annual proxy statement. However, to properly align this new shareholder vote with the political calendar, a corporation would need to schedule this vote at the end of its fiscal year, not, as the Majority suggests, at its annual meeting, which is typically held during the first quarter of each year. Corporations would then have to prepare and distribute a separate proxy statement for shareholders to express their approval or disapproval of the proposed political expenditures. It is an open question whether the U.S. Securities and Exchange Commission (SEC) has the requisite expertise to provide guidance to issuers as to what are `expenditures for political activities.' It is unclear how a corporation would go about proposing the `specific nature' of political expenditures to satisfy the requirements of this bill, especially given the fluidity of the political and electoral process.

By giving shareholders veto power over all political expenditures, this legislation also undermines the longstanding `business judgment rule,' which insulates the decisions of a corporation's board of directors from legal second-guessing as long as the board has engaged in a `rational or good faith effort to advance corporate interest.' The bill could open the door to requiring shareholder approval of other matters historically entrusted to corporate boards' discretion, such as charitable donations or advertising expenses. Moreover, H.R. 4790 would preempt state corporate law and make expenditures which shareholders have not approved a violation of the corporation's fiduciary duty to its shareholders. This is a serious departure from the long-established primacy of state corporate law. As former Supreme Court Justice Lewis Powell wrote in CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987), `no principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders.'

Section 4 of H.R. 4790 creates a new provision in the Securities Exchange Act of 1934 to require all issuers to disclose the votes of individual directors and force the U.S. equity exchanges to delist public companies that do not disclose their board votes. Such a requirement is not found in any state corporate law for any board decision. Board roll call votes are not required to declare bankruptcy, sell the corporation or its assets, accept a buyout, or oppose a takeover, which are all

more significant events for any publicly traded company than whether to make a specific political expenditure.

As troubling is a provision added during the Committee markup that would award triple damages to a shareholder if an officer or director authorizes a political expenditure without first obtaining the approval of a majority of shareholders. The damages awarded would be triple the amount of the political expenditure. In effect, these damages are exemplary and punitive. This provision is therefore inconsistent with the original intent of the Securities Exchange Act of 1934, which makes no mention of exemplary or treble damages. Neither statute nor case law supports any instance in which a shareholder has been allowed to recover treble damages as a result of the actions of a director or officer, and there is no historical support for awarding treble damages in the context of authorizing expenditures for advertisements. While treble damages are awarded in antitrust and RICO cases, those cases are aimed at punishing criminal behavior. As noted above, awarding treble damages in this context goes against the original intent of the '34 Act, and inappropriately penalizes conduct when the wrong alleged is a civil injury, not a crime or misdemeanor.

The `Shareholder Protection Act' applies to corporations, but notably, it does not apply to unions. There is no provision in Federal law that allows union members to vote to either approve or disapprove their union's political expenditures. Unions are the single largest contributor to political campaigns in the country. Unions and their political action committees claim to have spent nearly $450 million in the 2008 presidential race, and have accounted for approximately 40% of campaign-related spending this year, as opposed to corporations, which account for less than 15%. Unions reportedly `plan an enormous spending spree to help ensure Democratic control of Congress' after this fall's elections. On June 26, 2010 Larry Scanlon, political director for the American Federation of State, County, and Municipal Employees (`AFSCME'), acknowledged the benefits conferred by the Citizens United decision on organizations like his when he said that `the Citizens United case has taken the lid off, and so we can use our soft money for express advocacy directly.' Three unions alone--AFSCME, the AFL-CIO, and the Service Employees International Union--expect to spend more than $150 million in the 2010 mid-term elections.

To provide union members with the ability to decide whether their union dues should be used for political purposes or not, Republicans strongly supported Representative Hensarling's amendment prohibiting H.R. 4790 from taking effect until H.R. 5860, the `Union Member Protection Act,' is first enacted. H.R. 5860 applies the framework established in H.R. 4790 to unions, creating parity by giving actual union members (not just fee-paying nonmembers) a vote on their union's political contributions. Unfortunately, the Majority voted almost entirely along party lines to reject this equitable application of the Citizens United decision to labor unions and publicly traded companies despite clear guidance from the Court that both were covered by its decision.

The Committee ordered H.R. 4790 favorably reported without holding a single legislative hearing to examine its far-reaching impact on corporate governance and its chilling effect on political free speech. The `Shareholder Protection Act' is a flawed response in search of a problem that does not exist. Republicans believe that the House should reject this ill-considered legislation and send it back to the Committee on Financial Services for a more thorough review of its potential unintended consequences.

SPENCER BACHUS.

SCOTT GARRETT.

KEVIN MCCARTHY.

JEB HENSARLING.

PETER KING.

J. GRESHAM BARRETT.

RANDY NEUGEBAUER.

JUDY BIGGERT.

TOM PRICE.

LYNN JENKINS.

RON PAUL.

MIKE CASTLE.